

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Progeny LMS, LLC)	File No. RM-10403
)	
Amendment of Part 90 of the Commission's)	
Rules Governing the Location and Monitoring)	
Service to Provide Greater Flexibility)	

**REPLY COMMENTS OF
PCS PARTNERS, L.P.**

David G. Behenna
PCS Partners, LP

Mark J. Tauber
Vincent M. Paladini

PIPER RUDNICK LLP
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
202-861-3900

Its Attorneys

June 3, 2002

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Progeny LMS, LLC)	File No. RM-10403
)	
Amendment of Part 90 of the Commission's)	
Rules Governing the Location and Monitoring)	
Service to Provide Greater Flexibility)	

**REPLY COMMENTS OF
PCS PARTNERS, L.P.**

INTRODUCTION

PCS Partners, L.P. (“PCS Partners”), by and through counsel, pursuant to 47 C.F.R. §1.2108(c), hereby replies to comments filed in response to the Petition for Rulemaking filed by Progeny LMS, LLC (“Progeny”) requesting amendment of Part 90 of the Commission’s rules governing location and monitoring services (“LMS”)¹. PCS Partners holds several FCC Spectrum Licenses, and has participated in a number of Spectrum Auctions, including those held for location monitoring service (“LMS”) licenses.

¹ See *Petition of Progeny LMS, LLC for Amendment of Part 90 of the Commission’s Rules Governing the Location and Monitoring Service to Provide Greater Flexibility*. (“Progeny Petition”).

PCS Partners supports Progeny's Petition to initiate a rulemaking to provide LMS licensees the regulatory flexibility to develop and deploy new services. Specifically, PCS Partners agrees with Progeny that the ability of LMS licensees to develop and deploy economically viable LMS networks and services is substantially constrained by the operational and technical limitations that the Commission applied to LMS services between five and seven years ago.² Although these limitations may have been an appropriate means for mitigating the likelihood of interference among primary and secondary users of the 902-928 MHz band, supervening technological advancements and marketplace changes have rendered those limitations counter-productive.

DISCUSSION

The Commission has previously established that its policy is to assign spectrum in a manner that will "provide the greatest benefit to the American public."³ Moreover, the Commission has recently modified its rules to provide additional flexibility for Part 15 operators.⁴ As further discussed below, it would contradict that policy and be inconsistent with those recent decisions if the Commission were to refuse to consider rule

² *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, Report and Order*, 10 FCC Rcd 4695 (1995) ("1995 LMS Order"); *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 13942 (1997) ("1997 LMS Order").

³ *See Principles for the Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 FCC Rcd 19869 (1999) at paras. 7-9. ("Spectrum Policy Statement").

⁴ *See Amendment Of Part 15 Of The Commission's Rules Regarding Spread Spectrum Devices, Second Report And Order, ET Docket No. 99-231, Rel. May 30, 2002, FCC No. 02-15; 1998 Biennial Regulation Review-Conducted Emissions Limits Below 30 MHz For Equipment Regulated Under Parts 15 And 18 Of The Commission's Rules, Report and Order, ET Docket No. 98-80, Rel. May 30, 2002, FCC No. 02-157.*

modifications that could enable LMS licensees to develop and deploy innovative services without first reviewing technological and policy options that may permit such flexibility without risking undue interference with Part 15 operators. Consequently, the Commission should commence a rulemaking to reconcile its LMS rules with the technology and market changes that have occurred in the wireless arena since the LMS rules were first established, and to promote the interests of all present and potential users of the 902-928 MHz band.

I. The Commission should grant Progeny’s Petition for Rulemaking rather than foreclose the opportunity for the development and deployment of new, innovative services by LMS licensees.

When the Commission initially established its LMS rules, it assumed that its action would precipitate the development of advanced transportation-related services, alternatively named “Intelligent Vehicle Highway Systems (“IVHS”)” or “Intelligent Transportation Systems (“ITS”)”.⁵ These systems were expected to help to “improve the efficiency and safety of the nations highways, reduce harmful automobile emissions, promote efficient energy use, and increase national productivity” by providing traffic, navigational and other information to motorists.⁶ Needless to say, in the seven years since the establishment of the LMS rules, wireless traffic, navigational and other information services have become available to motorists, but through CMRS, GPS, and other such services, rather than through LMS. Moreover, these non-LMS services now compete for the market that LMS licensees were intended to serve, but the Commission’s

⁵ See *1995 LMS Order*, 10 FCC Rcd 4695, at para. 5.

⁶ *Id.*

rules currently prevent LMS licensees from developing new products that can compete against these non-LMS services. Regardless of how “carefully crafted” the FCC’s LMS rules were when they were established, the paradigms of the wireless and capital markets have fundamentally changed in the five years since these rules were last addressed, rendering the LMS rules ripe for the Commission’s review.⁷ Consequently, Progeny’s request for the Commission to initiate a technical analysis of the “safe harbor” and other rules which currently limit the ability of LMS licensees to develop new, innovative services is timely, consistent with the Commission’s spectrum allocation policy and recent decisions, and promotes the public interest, as further discussed below.

It would be inappropriate for the Commission to prematurely decline the opportunity to evaluate the potential benefits to be gained by providing LMS licensees with additional flexibility because of generalized interference concerns voiced by certain Part 15 operators. The relative lack of investment and consumer interest in the LMS arena, as compared to the substantial investment and consumer interest in other wireless sectors indicate that it is appropriate for the Commission to examine its LMS rules to ascertain if the LMS restrictions are frustrating investment in and development of that spectrum. The commenters opposed to Progeny’s Petition hypothesize that such an examination will have negative implications for Part 15 users. Certainly, the Commission should address the legitimate concerns of Part 15 operators, even if those concerns are somewhat overstated. However, the Commission should do so in the course

⁷ See *Comments of SchlumbergerSema Inc.* at 2.

of a rulemaking that fairly considers the public interest in innovation as well as the interests of all 902-928 MHz band stakeholders.

A. Certain arguments made by commenters opposed to Progeny’s Petition are overbroad and potentially misleading.

Several commenters oppose Progeny’s Petition, claiming that Progeny seeks to “rewrite” the Commission’s LMS rules “at the expense of license-exempt Part 15 operators” and that providing additional flexibility for LMS licensees would “eliminate the possibility of Part 15 devices coexisting with LMS operators in the 902-928 MHz band.”⁸ We believe that it is grossly incorrect to characterize this matter as a “zero-sum” game pitting LMS licensees against Part 15 operators. Such attempts to Balkanize this matter are not conducive to reasonable consideration of the technical issues, Commission policies, and specific interests of the various parties that may be affected by modification of the LMS rules.

From the outset, Progeny asserts that the vast majority of Part 15 operators pose no threat of interference to LMS licensees. Nevertheless, commenters opposed to Progeny’s Petition overstate the potential impact of modifications to the LMS restrictions. Progeny’s Petition does not request modification of the LMS spectrum allocation, nor does it request that hierarchy of primary and secondary users of the 902-928 MHz spectrum be disturbed to benefit LMS licensees. In its 1997 LMS Order, the Commission stated that the 902-928 MHz band is allocated for primary use by Federal Government radiolocation systems, then for Industrial, Scientific and Medical (“ISM”) devices. Next in priority are Federal Government fixed and LMS operations. The LMS

⁸ See *Comments of the License-Exempt Alliance* at 1

spectrum allocation is limited to three discrete blocks: (1) 904.000–909.750 and 927.75–928.000 MHz; (2) 919.750–921.750 and 927.500–927.750 MHz; and (3) 921.750–927.250 and 927.250–927.500 MHz, covering slightly more than 50% of the available spectrum in the 902–928MHz band. Subordinates to these users are licensed amateur radio operations and unlicensed Part 15 equipment.⁹ Part 15 devices are generally permitted to operate on any frequency, except in designated restricted bands.¹⁰ All Part 15 devices operate contingent upon their non-interference with authorized radio services. In addition, Part 15 devices are supposed to accept any interference received from other radio operations.

Certain arguments presented by these commenters depict unsubstantiated and possibly technologically flawed worst-case outcomes from an LMS rulemaking. Contrary to these arguments, Progeny’s Petition does not threaten Part 15 operations in the 902–928 MHz band.¹¹ Progeny merely seeks, on behalf of all similarly situated LMS licensees and interested parties, the ability to deploy innovative services and to enjoy without unreasonable restraint the protections ordinarily provided a superior position in the hierarchy of spectrum users. Moreover, it is noteworthy that the entities holding spectrum rights superior to LMS licensees have not filed comments in opposition to Progeny’s petition.

⁹ See *1997 LMS Order*, 12 FCC Rcd 13842, at para. 4.

¹⁰ See 47 C.F.R. §§ 15.205 and 15.209(a).

¹¹ See *Comments of Axonn, LLC* at 7-8.

B. Grant of Progeny's Petition is consistent with the Commission's spectrum allocation policy and recent related decisions and may lead to the development and deployment of new consumer services.

As noted above and in the Progeny Petition, the Commission's established policy is to allocate spectrum in a manner that renders the most public benefit, and to encourage the development of new and efficient transmission technologies.¹² PCS Partners believes that, rather than forego the opportunity for LMS licensees to obtain the funding to create new, innovative services, it would better serve the public interest for the Commission to initiate a rulemaking to consider modifications to the "safe harbor" and other LMS-related rules and to identify and evaluate alternative technological solutions and methodologies which would mitigate the concerns of any affected Part 15 operators while promoting the development of innovative LMS services.

Nevertheless, WaveRider specifically argues that it is "debatable" whether the viability of LMS services in the 900 MHz band would be enhanced by the providing additional flexibility for LMS licensees, since consumers can obtain services similar to those discussed by Progeny. This argument is contrary to the public interest and the Commission's long-held policy of promoting innovation and maximizing the potential benefits from its spectrum allocations. Apparently, WaveRider and the other commenters opposed to Progeny's Petition would rather see the LMS spectrum allocation remain fallow than engage in a rulemaking to consider the interests of both LMS and Part 15 operators.

¹² See Progeny Petition at 8, citing *Spectrum Policy Statement*, 14 FCC Rcd 19868 at paras. 7-9.

In addition, SchlumbergerSema Inc., (“SSI”) argues that LMS licensees should be restricted to a specific product “niche” market defined a half a decade ago, regardless of the fact that CMRS licensees now provide services to that niche market.¹³ There is nothing to be gained by ignoring relevant changed circumstances and preserving as a historical artifact restrictions that prevent current LMS licensees from developing and deploying new and innovative consumer services. Contrary to SSI’s arguments, the fact that CMRS licensees can and do serve the niche market originally associated with LMS licensees is a very good reason to review regulatory restrictions that prevent LMS licensees from providing competitively viable consumer services. Moreover, continuing to prevent LMS licensees from developing competitive services only guarantees that the spectrum allocated to LMS services will remain underutilized, contrary to the Commission’s established spectrum allocation policy.

Finally, as an LMS licensee, Progeny has apparently become aware that the threat of interference from certain Part 15 activities is having a negative effect on its ability to obtain equipment and financing for the development of new consumer services.¹⁴ Ironically, Ricochet Networks argues that eliminating restrictions on the types of communications or services provided by primary LMS licensees would deny secondary Part 15 operators the “stability and consistency necessary for appropriate investment and

¹³ See *Comments of SchlumbergerSema, Inc.* at 2, 5.

¹⁴ See *Progeny Petition* at 15-16.

deployment.”¹⁵ The problem that Progeny seeks to resolve is the lack of stability and consistency regarding the possibility of Part 15 interference with LMS traffic and the Commission’s effort to maximize the flexibility of wireless service providers.

We agree with both Ricochet and Progeny that regulatory stability and consistency are necessary for investment in and the deployment of consumer products in both the LMS and Part 15 areas. However, LMS licensees are the primary users of the 902-928 MHz band and Part 15 operators are the secondary users of that band. It would be putting the cart before the horse to restrict the rights of primary users solely to benefit unlicensed secondary users. Moreover, Part 15 operators are not restricted to the 902-928 MHz band, as are LMS licensees, but may also operate in the 2.4 and 5.7 GHz bands. Furthermore, the Commission has recently provided Part 15 operators the flexibility to deploy new technology, such as frequency hopping spread spectrum (“FHSS”) systems. In light of the Commission’s acceptance of new technology that supports increased flexibility for secondary, Part 15-based users of the 902-928 MHz band, it is appropriate for the Commission to address the prospect of additional flexibility for the primary users of that band.

II. The Progeny Petition Agrees with the Commission’s Established Rules Spectrum Allocation Policies.

When the Commission first established its LMS rules, it noted that “LMS systems have the potential to offer a wide array of services that go beyond the mere tracking of vehicles” and that developing “a diversity of LMS services is important to promote

¹⁵ See *Comments of Ricochet Networks, Inc.*, at 17.

competition and continued technological advances.”¹⁶ Nevertheless, the Commission adopted certain “safe harbor” restrictions as a practical allowance for certain unlicensed, albeit secondary, users of the 902-928 MHz band.¹⁷ When doing so, however, the Commission clearly stated that while the safe harbor rules were “intended to identify Part 15 and amateur operations that will, in all cases, be deemed not to cause harmful interference to LMS operators,”¹⁸ “unlicensed Part 15 operations have no vested or recognizable right to continued use of any given frequency.”¹⁹

As noted above, the Commission’s spectrum policy is intended to provide “the greatest benefit to the American public.”²⁰ Nevertheless, Part 15 operators opposed to the Progeny Petition argue that the Commission should not even entertain the possibility of updating its LMS and safe harbor rules to facilitate the development of new services that can benefit the American public because such modifications may affect Part 15 operators that have “no vested or recognizable right to continued use” of the LMS frequency. This argument is diametrically opposed to the Commission’s spectrum allocation policy and Part 15 rules and grossly overstates the Commission’s intention for establishing the safe harbor rules. Moreover, the Part 15 operators provide no specific

¹⁶ See *1995 LMS Order*, 10 FCC Rcd 4695, at paras. 19, 20.

¹⁷ See *1995 LMS Order*, 10 FCC Rcd 4695, at paras. 23, 25.

¹⁸ See *1997 LMS Order*, 12 FCC Rcd 13492, at para. 33.

¹⁹ See *1997 LMS Order*, 12 FCC Rcd 13492 at para. 32; *1995 LMS Order*, 10 FCC Rcd 4695, at para. 35; 47 C.F.R. § 15.5.

²⁰ See *Spectrum Policy Statement*, 14 FCC Rcd 19869 at paras. 7-9.

economic, technical or public policy benefit to be gained by dismissing the Progeny Petition, except with regard to their narrow self-interest.

Several commenters opposed to Progeny's Petition argue that Commission has previously reviewed its LMS rules, and imply that the Commission's conclusions in those prior reviews must remain fixed in stone, regardless of relevant changes to facts underlying those conclusions.²¹ However, the Commission last conducted such a review in 1997. As the Commission is more than aware, the consumer wireless industry has grown and changed dramatically over the past five years.²² As discussed in the Progeny Petition, from time to time the Commission has revised its rules to enable spectrum licensees to provide new and innovative services.²³ This policy facilitates the evolution of wireless services by removing out-of-date and service-limiting spectrum use restrictions, while protecting primary spectrum users from interference from secondary and tertiary users.

Furthermore, the Commission has recently issued several orders, including two orders during the past month, modifying its rules to provide additional flexibility to Part 15 operators.²⁴ Although Part 15 users benefiting from those orders have inferior rights to those held by LMS licensees, we do not fault the Commission's efforts to provide Part

²¹ See *Comments of Axonn, LLC* at 2; *Comments of Itron, Inc.* at 3; *Comments of the License-Exempt Alliance* at 3.

²² See *Progeny Petition* at 17-21.

²³ *Id.* at 13.

²⁴ *Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems, First Report and Order, ET Docket 98-153, FCC 02-48, rel. Apr. 22, 2002* (amending Part 15 to permit the marketing and operation of new products incorporating ultra-wideband ("UWB") transmission technology).

15 operators with the ability to develop new services. Rather, we encourage the Commission to continue to support flexibility and innovation and initiate a rulemaking to remove or redefine the safe harbor and other LMS rules in order to provide LMS licensees with the opportunity to establish innovative consumer services.

Nevertheless, Axonn, LLC opposes initiation of a rulemaking that could benefit LMS licensees, arguing that they “got what [they] paid for,” as if the important issue before the Commission was a matter of *caveat emptor* rather than putting underutilized spectrum to its highest and best use. Axonn, a manufacturer of unlicensed spread spectrum wireless devices, admonishes Progeny’s “disingenuous” effort to enable LMS licensees to provide innovative consumer services. Ironically, Axonn filed its comments on the day before the Commission issued an order amending Part 15 to enable new digital transmission technologies to operate in the 902-928 MHz and other bands and providing additional flexibility for FHSS systems. Apparently, Axonn does not view it as disingenuous to benefit from the rule modifications that benefit the unlicensed, lower-priority users of the 902-928 MHz band while arguing that the Commission should not modify its rules to benefit the higher-priority licensees who paid for access to specific spectrum in the 902—928 MHz band.

In light of the Commission’s recent actions favoring Part 15 operators, it is somewhat surprising that these operators would argue that LMS licensees should be hamstrung by a lack of regulatory flexibility.²⁵ The Progeny Petition does not request

²⁵ For instance, the License-Exempt Alliance asserts, without explanation, that permitting LMS facilities to be used for real-time voice communications would cause interference in the 902-928 MHz band “forc[ing] Part 15 operations out of that spectrum.” By making this allegation, the License-Exempt Alliance ignores

(Footnote continued to next page)

that Part 15 operators be relocated out of the 902-928 MHz band, only that such unlicensed, secondary users be clearly precluded from interfering with the licensed users operating in that spectrum and that LMS licensees should not be subject to unreasonable and unnecessary regulatory limitations . Assuming *arguendo* that the safe harbor and other LMS restrictions were a practically appropriate means for facilitating the proliferation of Part 15 devices in specific circumstances and at a specific point in time, it is certainly appropriate that the Commission should periodically review those measures and restrictions to ensure that they continue to promote, rather than restrict, innovation and deployment of both licensed and unlicensed services. The Commission's failure to engage in such a periodic analysis in response to the arguments filed by commenters opposed to the Progeny Petition would produce a perverse situation wherein the rights of secondary users of the 902-928 MHz spectrum would outweigh the rights of the primary users of that spectrum.

(Footnote continued from previous page)

the fact that LMS licensees are the primary users of that spectrum as well as the possibility of both LMS and Part 15 operators using advanced, frequency-agile technologies to minimize the prospect of interference. See *License-Exempt Alliance* at 5.

CONCLUSION

In sum, the Progeny Petition presents a number of substantial arguments that should compel the Commission to undertake a rulemaking to provide the regulatory flexibility necessary for LMS licensees to develop and deploy innovative consumer products. The arguments presented by commenters opposed to the initiation of such a rulemaking do not demonstrate that denial of Progeny's Petition would agree with the Commission's spectrum allocation policy or decisions, or otherwise serve the public interest. Consequently, the Commission should grant Progeny's Petition for Rulemaking.

Respectfully submitted,

David G. Behenna
PCS Partners, LP

/s/Vincent M. Paladini
Mark J. Tauber
Vincent M. Paladini

Piper Rudnick LLP
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
202-861-3900
Its Attorneys

June 3, 2002

CERTIFICATE OF SERVICE

I, Evelyn Opany, a secretary in the law firm of Piper Rudnick, LLP, do hereby certify that I have on this 3rd June, 2002 caused copies of the foregoing Reply Comments of PCS Partners, L.P. to be served by Hand Delivery to the following:

Marlene Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Julius Knapp
Federal Communications Commission
Office of Engineering and Technology
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Richard Arsenault
Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau
Room 4-A267
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Paul Kolodzy
Federal Communications Commission
Office of Engineering and Technology
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20054

Albert Halprin
Stephen L. Goodman
Halprin, Temple, Goodman & Maher
555 12th Street, NW
Suite 950-North
Washington, DC 20004

/s/ Evelyn Opany

Evelyn Opany